

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1916.

No. 3035.

395

THE WASHINGTON RAILWAY & ELECTRIC COMPANY,
A CORPORATION, APPELLANT,

vs.

FRANK W. PERRY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED NOVEMBER 14, 1916.

PRINTED DECEMBER 29, 1916.



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Court of Appeals of the District of Columbia

No. 3035.

THE WASHINGTON RAILWAY & ELECTRIC COMPANY, a Corporation,
Appellant,

vs.

FRANK W. PERRY.

a Supreme Court of the District of Columbia.

At Law. No. 57194.

FRANK W. PERRY, Plaintiff,

vs.

THE WASHINGTON RAILWAY & ELECTRIC COMPANY, a Corporation,
Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 Declaration.

Filed August 25, 1914.

In the Supreme Court of the District of Columbia.

At Law. No. 57194.

FRANK W. PERRY, Plaintiff,

vs.

THE WASHINGTON RAILWAY & ELECTRIC COMPANY, a Corporation,
Defendant.

The plaintiff, Frank W. Perry, sues the defendant, the Washington Railway & Electric Company, a corporation, having offices and agents and doing business in the City of Washington, District of Columbia, for that heretofore to wit, at and before the happening of the grievances hereinafter mentioned, the defendant was and still

is a common carrier of passengers for hire, and as such used, owned and operated certain lines of electric railway along certain streets and avenues in said City and District aforesaid; that the said defendant aforesaid not only operated an electric railway in the City of Washington, District of Columbia as aforesaid, but also operated and operates a railway in the State of Maryland, running from what was formerly known as Georgetown, District of Columbia, to Cabin John Bridge, in said State and that along said line is a place called Glen Echo where persons are invited to go by the said defendant aforesaid for amusement, and that said plaintiff boarded a car of the said defendant at to wit 10.15 in the evening of Sunday, the 31st day of May, 1913, at Glen Echo aforesaid, the said car being a through car,

2 one that runs from Cabin John Bridge to Fifth & F Streets, Northwest; that the said plaintiff was sitting in the rear seat of said car, having been received as a passenger thereon and paid the usual and customary fare, and being a passenger as aforesaid, it then and there became and was the duty of the said defendant corporation to properly maintain and police the said car and to protect the said plaintiff not only from the acts of the agents or employees of the said railway company, but also from unlawful acts and boisterous conduct of other passengers or persons in and upon said car; that there boarded said car aforesaid at Glen Echo aforesaid a number of boys who were on the back of said car and who from said Glen Echo aforesaid until the happening of the event hereinafter mentioned, had been loud, boisterous and rough on said car, that said boys, passengers as aforesaid, continued said conduct from the time they left said Glen Echo until the said car arrived at 9th & F Streets, Northwest, that during said time aforesaid, although it was the duty of the said agents of the said defendant to curb the said noise and make the said passengers aforesaid behave, yet the said defendant, through its agents, negligently and carelessly permitted the said passengers aforesaid to act in said rough, unruly and boisterous manner, and that as said car arrived at 9th & F Streets aforesaid, one of the said passengers aforesaid broke a window of said car and the glass therefrom fell on the right leg of the said plaintiff and cut the tendon and arteries above the knee, and otherwise bruised and injured said plaintiff, and by reason thereof the said plaintiff was confined to his bed for a long period of time, to wit, eight days, and was severely injured in and about the said leg, and he was otherwise bruised in and about the body, suffering pain, and his nervous system greatly shocked, and that he still suffers from said injury aforesaid,

3 and that he was compelled to expend money in the cure of himself, to wit, the sum of One Hundred Dollars (\$100.00), and by reason thereof the said plaintiff was damaged in the sum of Five Thousand Dollars (\$5,000.00).

Wherefore, plaintiff brings this suit and claims of the defendant the sum of Five Thousand Dollars (\$5,000.00) besides costs of this suit.

DANIEL W. BAKER,
JOHN W. STAGGERS,
Attorneys for Plaintiff.

Plea.

Filed September 18, 1914.

* * * * *

Now comes the defendant in the above entitled cause, and for plea to the declaration filed herein, says that it is not guilty as in said declaration alleged.

GEO. P. HOOVER,
Attorney for Defendant.

Joinder of Issue.

Filed September 19, 1914.

* * * * *

The plaintiff joins issue with the defendant on the plea filed in the above entitled cause.

DANIEL W. BAKER,
JOHN W. STAGGERS,
Attorneys for Plaintiff.

Memorandum.

March 8, 1916.—Verdict for Plaintiff for \$500.00.

4

Motion in Arrest of Judgment.

Filed March 13, 1916.

* * * * *

Now comes the defendant, by its Attorney, and moves the Court to arrest the entry of judgment on the verdict of the jury rendered in this case on the 8th day of March, 1916, for the following reasons:

- (1) The plaintiff's declaration fails to state a cause of action.
- (2) The plaintiff's declaration does not show that the breaking of the glass which caused the injury to the plaintiff was the result of or connected with the loud, boisterous and rough conduct of the certain boy passengers mentioned in said declaration, or that the breaking of the glass was pursuant to any purpose or design on the part of any passengers, or that said purpose or design, if it existed, was known or could have been known to the defendant or its employes, or that the defendant or its employes had reason to know that any danger of any kind threatened the plaintiff as a probable result of said loud, boisterous and rough conduct, or that the breaking of the glass resulted proximately from said loud, boisterous and rough conduct.

JNO. S. BARBOUR,
Attorney for Defendant.

To Messrs. Daniel W. Baker, Jno. W. Staggers, Att'ys for Plaintiff:

Please take notice that the above motion, together with a motion for a new trial in the same case, will be for hearing before Mr. Justice Gould on March 17, 1916.

JNO. S. BARBOUR,
Attorney for Defendant.

5

Motion for New Trial.

Filed March 13, 1916.

* * * * *

Now comes the defendant, by its Attorney, and moves the Court to set aside the verdict of the jury rendered in this case on the 8th day of March, 1916, and grant it a new trial, for the following reasons:

- (1) The verdict was and is contrary to the evidence.
- (2) The verdict was and is unsupported by the evidence.
- (3) The verdict was and is contrary to the weight of the evidence.
- (4) The verdict was and is contrary to the Court's instructions.
- (5) The Court erred in refusing the defendant's prayer No. 1.
- (6) The Court erred in refusing the defendant's prayer No. 4.
- (7) The Court erred in refusing the defendant's prayer No. 6.
- (8) The Court erred in refusing the defendant's prayer No. 7.
- (9) The Court erred in refusing the defendant's prayer No. 8.
- (10) Because the evidence failed to show that there was reasonable ground for the defendant to apprehend personal injury to the plaintiff from the conduct of passengers on the car.
- (11) Because the verdict was grossly excessive.

JNO. S. BARBOUR,
Attorney for Defendant.

6 To Messrs. Daniel W. Baker, Jno. W. Staggers, Att'ys for Plaintiff:

Please take notice that the above motion, together with a motion in arrest of judgment in the same case, will be for hearing before Mr. Justice Gould on March 17, 1916.

JNO. S. BARBOUR,
Attorney for Defendant.

Memorandum.

March 24, 1916.—Time to submit motions in Arrest of Judgment and for a New Trial extended to and including April 1, 1916.

Supreme Court of the District of Columbia.

FRIDAY, March 31, 1916.

Session resumed pursuant to adjournment, Mr. Justice Gould presiding.

* * * * *

Upon consideration of the motions of defendant filed herein by its Attorney, in arrest of judgment and for a new trial, it is ordered that said motions be, and the same hereby are overruled, to which defendant notes an exception, and judgment on verdict is ordered.

Wherefore, it is considered that the plaintiff herein recover of defendant the sum of Five hundred dollars (\$500) with interest thereon from this date, being the money payable by said defendant to plaintiff by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

7 From the foregoing judgment, the defendant by its Attorney in open Court, in the presence of Counsel for plaintiff, notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond on said appeal to operate as a Supersedeas is hereby fixed in the sum of Six hundred dollars (\$600.00).

Memoranda.

April 21, 1916.—Supersedeas bond approved and filed.

May 15, 1916.—Bill of Exceptions submitted.

May 31, 1916.—Time to file transcript of record extended to and including June 30, 1916.

June 20, 1916.—Time to file transcript of record extended to and including August 1, 1916.

July 25, 1916.—Time to file transcript of record extended to and including September 15, 1916.

September 14, 1916.—Time to file transcript of record extended to and including October 16, 1916.

October 13, 1916.—Time to file transcript of record extended to and including November 15, 1916.

8 *Notice to Counsel of Submission of Bill of Exceptions.*

Filed October 13, 1916.

To Messrs. D. W. Baker, J. W. Staggers, Attorneys for Plaintiff.

GENTLEMEN: I am herewith handing you copy of the proposed Bill of Exceptions in the case of Frank W. Perry vs. Washington Railway and Electric Company, At Law No. 57194, which will be presented to the Court on the 15th day of May, 1916, for settlement.

Will you please accept service of copy, and oblige.

Yours very truly,

JNO. S. BARBOUR,
Attorney for Defendant.

Service of a copy of the proposed Bill of Exceptions acknowledged this 4th day of May, 1916.

DANIEL W. BAKER,
JOHN W. STAGGERS,
Per H. A. G.,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

FRIDAY, October 13, 1916.

Session resumed pursuant to adjournment, Mr. Chief Justice Covington presiding.

* * * * *

By Justice Gould.

The Court having this day signed the Bill of Exceptions heretofore submitted herein, now orders the same of record as of the time of the noting thereof at the trial.

9

Assignments of Error.

Filed October 23, 1916.

* * * * *

Now comes the Defendant, the Washington Railway and Electric Company, by its Attorney, and files the following Assignments of Error:

1. The Court erred in refusing to direct a verdict for the defendant at the conclusion of the plaintiff's case.
2. The Court erred in refusing to direct a verdict for the defendant at the conclusion of all of the evidence.
3. The Court erred in refusing the defendant's prayer No. 1.
4. The Court erred in refusing the defendant's prayer No. 4.
5. The Court erred in refusing the defendant's prayer No. 6.
6. The Court erred in refusing the defendant's prayer No. 7.
7. The Court erred in refusing the defendant's prayer No. 8.
8. The Court erred in overruling the defendant's motions in arrest of judgment and for a new trial and entering judgment on the verdict in favor of the plaintiff, because
 - (a) The plaintiff's declaration fails to state a cause of action;
 - (b) The verdict was grossly excessive.

JNO. S. BARBOUR,
Attorney for Defendant and Appellant
Washington Railway and Electric Co.

Service of a copy of the foregoing is hereby acknowledged this 21st day of October, 1916.

DANIEL W. BAKER,
 J. W. STAGGERS,
Attorneys for Plaintiff.

10

Designation of Record.

Filed October 23, 1916.

* * * * *

Directions to Clerk in Preparation of Record.

The Clerk, in preparing the Transcript of Record in the above entitled suit, will please embody the following, viz:

1. Plaintiff's Declaration.
2. Defendant's plea.
3. Plaintiff's joinder of issue.
4. Memo.: Verdict of jury for plaintiff.
5. Defendant's motions in Arrest of Judgment and for a New Trial.
6. Memo.: Continuance of defendant's motions in Arrest of Judgment and for a New Trial.
7. Memo.: Defendant's motions in Arrest of Judgment and for a New Trial overruled; judgment on verdict for plaintiff; appeal noted in open court; appeal bond fixed.
8. Memo.: Approval and filing of appeal bond.
9. Notice served on plaintiff's counsel *will* Bill of Exceptions submitted.
10. Memo.: Bill of Exceptions submitted.
11. Memo.: Extensions of time for filing Transcript of Record in Court of Appeals.
12. Memo.: Settling Bill of Exceptions.
13. Assignments of Error.
14. This Designation.

JNO. S. BARBOUR,
Attorney for Defendant and Appellant
Washington Railway and Electric Co.

Service of a copy of the above is hereby acknowledged this 19th day of October, 1916.

DANIEL W. BAKER,
 J. W. STAGGERS,
Attorneys for Plaintiff.

11

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 10, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 57194 at Law, wherein Frank W.

Perry is Plaintiff and The Washington Railway & Electric Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 7th day of November, 1916.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

12 To Messrs. D. W. Baker, J. W. Staggars, Attorneys for Plaintiff.

GENTLEMEN: I am herewith handing you copy of the proposed Bill of Exceptions in the case of Frank W. Perry vs. Washington Railway and Electric Company, At Law No. 57194, which will be presented to the Court on the 15th day of May, 1916, for settlement.

Will you please accept service of copy, and oblige.

Yours very truly,

JNO. S. BARBOUR,
Attorney for Defendant.

Service of a copy of the proposed Bill of Exceptions acknowledged this 4th day of May, 1916.

DANIEL W. BAKER,
JOHN W. STAGGERS,
Attorneys for Plaintiff.

Per H. A. G.

13 In the Supreme Court of the District of Columbia.

At Law. No. 57194.

FRANK W. PERRY, Plaintiff,

vs.

WASHINGTON RAILWAY AND ELECTRIC COMPANY, Defendant.

Bill of Exceptions.

Be it remembered that the above entitled cause coming on for trial on the 8th day of March, 1916, before the Honorable Ashley M. Gould, Associate Justice of the Supreme Court of the District of Columbia, and a jury empaneled and sworn to try the issues between the parties, the plaintiff, in order to maintain the issues on his part joined, produced as witness on his own behalf, testified in substance as follows:

That his full name was FRANK WESLEY PERRY; that he is at present employed by Mr. William M. Selan; that in May, 1914, he was employed as bookkeeper for the P. D. Morrison Stationery Company; that on May 31, 1914, he, accompanied by a friend, Mr. Thomas—James Benjamin Thomas—went out to Glen Echo; on the

return trip they boarded an open car at Glen Echo, and sat on the last seat on the inside; that some boys were standing on
14 the rear platform; that they started to sing and whistle and give cat calls, and were pushing and shoving each other around all the way; that Mr. Thomas left him at 11th and F Streets; one of the boys must have pushed one of them through the window, and a pane of glass came down over his shoulder and "it cut right through my leg." That he got off the car and went to O'Donnell's Drug Store; that they could do nothing for him and advised him to go to a hospital. "I saw Mr. Anderson and he said—he was with the railroad, and he helped me down to Emergency Hospital, and the doctor down there took a stitch in my leg." He then walked down to the Avenue and rode to 15th and the Avenue; that he was confined to the house for two weeks; that he was making \$18.00 a week; that he suffered pain; "little shocking pains went all through my right side. It kept me awake for two nights." Dr. Chipman called to see him five times in two weeks, and he went to his office once a week for "five or six months, I guess." He kept dressing his leg; that it was about two or three months before it was entirely healed. That
15 there is still a scar; that in damp weather he has pains in his leg; that he went back to work after the two weeks; that he was soliciting with the bookkeeping before the accident, but had to "cut out" the soliciting because he could not walk; that this did not affect his salary in any way; that he was lame for a month and a half or six weeks.

Q. Now just tell us what these boys were doing. A. Singing and whistling and giving cat calls, jumping up and down so as to make the car bounce, and pushing each other, so far as I could see.

Q. When you say they were jumping and shaking the car, just tell us about how they were shaking it. A. They were trying to make the car rock, trying to make it bounce on its springs. They were jumping up and down on the back platform, bouncing up and down, and that would make the car bounce up and down.

That there were about four or five of the boys—maybe more than that—and the one in the middle stood there and took his foot and pushed one and the other like that (illustrating) pushing them back and forth on the car. That the cat calls were loud enough for anybody on the streets to hear them; that he didn't hear any cursing or swearing; that nothing was broken before the pane of glass; that it came over his shoulder—right shoulder; that it injured his clothes; that it was three weeks before it stopped bleeding.

Upon cross-examination, plaintiff testified that he was twenty-three years of age; that he had been to Glen Echo; that he
16 was sitting on the inside seat in the back—the first seat under the pane of glass behind it—the window, and facing in the direction the car was going; that the boys were at his back and were only separated by the glass and the partition; that there was a seat between him and the boys—the seat on the rear platform; that the backs of the two seats were together; that the boys looked to be about 17 or 18 years old; that he did not complain to the conductor about disorder; that he had not been disturbed by the disorder up to that

time, and he did not have any complaint to make to the conductor up to the time the glass hit him; that no one else complained to the conductor; that he did not know whether any one else complained of being discomforted by their conduct; that the boys just seemed to be having a good time.

Q. There was nothing vicious about their conduct? A. Just pushing and skylarking—regular skylarking.

That he did not know what they were singing; that there was no vulgar or obscene language used to his knowledge; that he did not know whether the conductor said anything to them; "I didn't pay any attention to them at that time." That the glass was broken at 9th and F Sts.; that he heard the crash behind him, "And before I could jump a pane of glass came over." That he did not know whether the boys got off at that point; that he got off, 17 had intended going all the way out to Northeast; that he did not remember what became of the piece of glass, and did not have it in his hand when he left the car, and did not give it to Mr. Anderson and tell him that it was the piece of glass that had cut his leg. That it cut a gash about an inch and a half; that the doctor at the hospital took one stitch in it; that he did not know the doctor's name, but it was at Emergency Hospital; that he went home that night—right afterwards; that he went home on the street car; Mr. Anderson helped me home: "I rested on his arm and he helped me to the car and then he helped me from the car home." The wound did not stop bleeding when the doctor took the stitch in it; that he returned to his work at the end of two weeks and lost no further time; that the doctor called at the house about five times; that he would "bandage it and put this here powder on it to stop the bleeding." That he afterwards went to his office about once a week; that the doctor would dress it "and then he took the stitch out that they put in at the hospital, and he dressed it;" that the stitch was taken out about the third week; that he did not have the garment that was cut; he gave the suit away.

18 Thereupon, in order to further maintain the issue on his part joined, plaintiff offered as a witness JAMES BENJAMIN THOMAS who testified in substance as follows:

That he was a sheet metal worker; was acquainted with the plaintiff and was with him on the night in May, 1914 at Glen Echo; that they left Glen Echo between 10 and 10:30 on a summer car and sat in the first seat inside from the back; that there were four or five boys on the back platform; "My first attention was called to them by their hollering, and then I saw them later, after the car started, pulling and hauling one another, grabbing one another around the neck and shoving one another back and forth whistling and hollering and so forth." That this continued from the time the car started until he got off at 11th and F Sts., N. W. That they kept this up all the way in; hollering loud and whistling and cat calls and such like. That he noticed it before the car started; "they were grabbing one another around the neck and shoving one

another back and forth and hauling one another and slapping one another and such like all the way in." That the did not hear any cursing or swearing; the conductor was collecting fares; that the conductor did not do anything to stop the boys—"not that I heard."

19 That he was not on the car when Mr. Perry was hurt, but had gotten off at 11 and F Sts., though the conduct of the boys had continued to that point.

On Cross-examination witness stated he was twenty-five years old; that he had gone to Glen Echo with Mr. Perry and there was no one else in their party; were seated together on the last seat, facing the front, and the boys were at their rear, on the rear platform, standing up; that there was a seat between them; the windows were up; that he heard no cursing or swearing; that he was a little hard of hearing; that he made no complaint and did not hear any one else make a complaint "because they were all jolly along;" that he had never seen boys act like that on the street; that they kept pulling each other around and shoving all the way in "just a regular roughhouse"; that he did not complain as it did not inconvenience him and he did not feel alarmed, and nobody else on the car indicated any such thing—not to his knowledge; that there were between five and eight; that he did not say there were four or five; that the next time he saw the plaintiff he was in bed—about two days later; that he saw him occasionally after that; that he was in bed about seven or eight days; that plaintiff worked at the P. D. Morrison Stationery Company.

20 Thereupon, in order to further maintain the issues on his part joined, plaintiff offered as a witness Dr. CLINE N. CHIPMAN who testified in substance as follows:

That he has been practicing medicine in Washington since June, 1907; that he was engaged in general practice and surgery; that he was acquainted with the plaintiff, that he attended him the morning after he was hurt; that the plaintiff had a cut about an inch or an inch and a half above the knee cap on his right leg, "a cut through the skin." That it was impossible to say how deep it was cut but it had cut through the tendon that holds the knee cap. "You could feel a gap in it just the same as if you would put a piece of cloth or something on and stretch it and cut a notch in it and then put another piece of cloth over it. Of course you could feel that through the skin. The skin had been closed, of course, at the hospital." That he attended him about two weeks; the patient stayed at home during this time; after that he would call at his office once a week for about three months; that the patient is cured of any permanent injury; that he has not made out his bill, but it will amount to about \$35 or \$40. That the wound simply required ordinary dressings; the stitch or two stitches were removed at the

21 end of about seven or ten days. Witness thinks the wound healed up within two weeks—the skin part; that he would give no treatment except to examine it and watch it after patient went back to work, but that he required plaintiff to rub it—massage it.

Upon cross-examination witness testified he examined plaintiff the morning after the occurrence; that he took the dressing off that had been placed on at the hospital; the wound was all drawn together—the skin was, and the wound was not bleeding; there was some blood on the dressings; that he put his finger on it and pressed it, and examined it to see whether there was any glass, “or whatever I could find wrong.” “I didn’t find any glass, no. I found the portion of the tendon. I found the cut. I think it was about an inch or an inch and a half long.” He was sure of that. Q. Did the wound ever bleed after that? A. Why, possibly some. No, not to any extent. It would bleed when some of the stitches moved, but no extensive hemorrhage.” That he took the stitch out about seven or ten days afterwards, the ordinary time for removing a stitch. There

22 was nothing unusual about the healing of the wound any more than would be expected of a wound of that kind; that it did not heal up by what is known as first attention; there was some puss there for two or three days; that he never opened up the wound and there is no adhesion of any kind—not to any extent; the skin seems to be as flexible as any other skin on his body; that he has not seen any occasion to make out his bill; that he does not always wait two years to make out a bill, “but when a man has been out of work and has an operation, there has not been much use for trying to collect a bill.” Q. He has not said that he has been out of work. A. I know his condition. I treat his family, and his father has been sick, and one thing and another, and he has not been in condition to pay his bill.” That his father has not worked for about six years. That he saw plaintiff four or five times the first two weeks and once a week after that for about three months; after the cut on the knee; “there was a knot there and at first I thought possibly a piece of glass was in there. A. But you decided that it was not? A. I decided it was not any glass there, because his condition cleared up.” The first week he dressed it, and after the skin cleared up “I didn’t do much, as I told you, except watch it.” The

23 skin was all healed up within ten days or two weeks. Q. What could you do to him by looking at that wound for three months? What more could you do for him? A. As I stated, I didn’t do any more than tell him to massage his limb and take exercise and watch it to see whether—— Q. (Interposing.) You would have to tell him that once a week for about three months? A. I did, yes, sir.

On re-direct examination witness stated that pus is not ordinarily bloody. “It would not be bloody unless the tissue was bruised or cut. You take the dressing off and it might be mixed with blood, but the pus itself does not contain blood.

Thereupon, in order to further maintain the issue on his part joined, plaintiff offered as a witness ALICE MAGUIRE PERRY who testified in substance as follows:

That she is the mother of the plaintiff; that she remembered when he was injured; that he was in bed over a week; that he suffered much, and after he got up he was lame; “we all had to wait on

him"—about two weeks, and that he apparently suffered during that time.

On cross-examination witness testified that her son was in bed over a week, and was in the house two weeks more; that it was not
24 as much as three weeks; it was two weeks before he could get up and down steps, and he was lame during this period; that he also complained of being stiff and lame after this and could not get up and down steps very well and when he would sit down he could not get up; that this lasted beyond the three weeks; the doctor called every day the first week he was in the house and then he came every other day for two weeks more, and that was the last he came; that she had seen the wound on her son's knee; that she had to help tend to it—had to keep the bandage wet; she did this over a week; that she did not recall how long it was before she took the bandage off; had no idea, but it was over a week; must have been two weeks; that she had to wait on him; that she did not know how long it was before the wound healed; that it was two weeks before he got so she did not have to wait on him—that she didn't have to wait on him all the time; that she does not know what the doctor's bill is and does not know whether he had ever been rendered a bill.

Thereupon at the close of the plaintiff's testimony, the defendant by its counsel moved the Court to take the case from the jury and direct a verdict for the defendant, upon the ground that the
25 evidence of the plaintiff and his witnesses failed to show any situation which would make out a case of negligence on the part of the company.

The Court: How about the doctrine of *res ipsa loquitor*?

Mr. Barbour: They admit that it was not done by us; they claim that it was knocked out by some of these boys.

The Court: The motion is overruled.

Mr. Barbour: We save and exception.

Thereupon the defendant, in order to maintain the issues on its behalf joined, offered as a witness ALFRED CROSBY KINNAMON who testified in substance as follows:

That he is employed as a conductor for the defendant, and was employed in that capacity on May 31, 1914, and was on the car in which the glass was broken and one of the passengers had a cut
26 on his leg on that day; his run started from Glen Echo; that "just the regular routine" occurred on this trip; that "we had a bunch of young fellows or boys on the back end — were having a sort of good time in general, not raising any disturbance, only among themselves, singing and playing, and I think I spoke to them once not to make too much racket to annoy the passengers, and they didn't *and didn't* annoy anybody. Just before we got to 9th and F, I suppose the rush of getting off, pushing and shoving, one of them broke a big glass in the car window and a piece of this glass came down and struck one gentleman in the leg. I remember that very distinctly." That no one had made any complaint to him; and there was no indication on the part of anybody

on the car that they were discomforted; there was nothing to indicate that there was any danger to anybody; that he did not see anything such as a rough house or tugging like boys playing football; that the boys were from 12 to 18 years; there was no profane language; no indication of intoxication, and nothing vicious in their conduct toward each other or toward the passengers; that nothing occurred that would have justified him in expelling any of them from the car; that he cautioned them not to make too much noise and they didn't from then on.

27 On cross-examination witness testified that there were from six to nine of the boys; some were sitting and some were standing on the back of the car; they were not jostling each other; they were singing; that he did not see the window broken, but heard it; that he was three or four seats from the rear end on the running-board; that he spoke to them just as they were coming into the city; that he did not see them pulling and hauling or jostling each other; that they were behaving themselves; only singing; that he was back there a dozen times as that is a conductor's position, but he only spoke to them once. "They were singing, and I went back and told them not to make too much racket back there so as to annoy the other passengers."

Thereupon the defendant, in order to further maintain the issues on its part joined, produced as a witness Miss ROSA ECK, who testified in substance that she lives at 247 14th St., S. E.; that she

28 was a passenger on the car in question and remembered the piece of glass being knocked out of the window and cutting a passenger; that she was accompanied by Bertha Crain; that she did not know whether Miss Crain was ill or not. Witnesses stated that there were some boys on the back of the car; the car was crowded; the boys were sitting back there singing and having a good time coming in; that when they got near town they stopped singing and talking out loud, but were having a good time. That she did not see anything indicating that there was any danger to any passenger; they were not doing anything; everybody was having a nice time; the boys were all sizes; "I didn't take time to notice them back there, but I heard them." She heard them singing; did not hear any swearing or cursing or vulgar or profane language of any kind; there was no indication of discomfort to other passengers, and she heard no one complain; that she did not know any of the boys; she was on the car when the glass was broken; was sitting six

29 seats from the back, heard the breaking of the glass and turned around and looked; saw the glass out and a man getting off the car. "Somebody else met him right at the steps and took him over to the drug store;" the boys all jumped off.

Upon cross-examination witness testified that some of the boys ran after jumping off; that she was sitting about five or six seats from the back, near the end of the car where the conductor walks along, facing the way the car was running; that she had no occasion to look back to see if the boys were jostling among themselves; did not look around at all until the accident happened; had not

looked around before that; didn't really know what the boys were doing but did not think they were fighting because they were laughing and singing coming down.

Thereupon the defendant, in order to maintain the issue on its behalf joined, offered as a witness ERNEST C. BLUMBERG who testified in substance that he lived at 341 15th St., S. E., and was a passenger on a Glen Echo car in May, 1914, when a glass was broken and one of the passengers had his leg cut; that he was sitting about
30 three seats from the rear; did not know how many passengers were on the car but it was crowded; Witness saw some boys on the back of the car; they were singing and joking; that he could hear the noise but did not see any rowdyism, and saw no indications of discomfort on the part of other passengers; he was not inconvenienced in any way, and there was nothing to indicate danger to anybody; he heard no profane or vulgar language; that he saw the conductor, but does not know where he was at the time of the accident; that the car was coming between 9th and 10th streets on F street and was just beginning to slow down; passengers were getting ready to get off; rising from their seats. "I heard glass smash in the back and turned around and looked, and saw this young fellow cut." Witness did not know what became of the boys who were on the rear platform; thinks they got off the car; witness did not know any of them; witness was about two seats in front of plaintiff and saw him after he was cut; plaintiff was holding his knee; did not see piece of glass anywhere near him.

On cross-examination witness testified that he did not see plaintiff have piece of glass in his hand; did not notice anything about this thing until he heard the crash; did not pay any attention to the boys and had not looked around, and did not know whether or not they were jostling among themselves.

31 On redirect examination witness stated there was nothing to attract his attention to make him look back.

Thereupon the defendant, in order to maintain the issues on its behalf joined, offered as a witness HARRY COHEN, who testified in substance that he lived at 433 M Street and was 18 years old; that he was on a car coming from Glen Echo park when one of the passengers had his leg cut by a broken glass; was sitting about the third seat from the rear; Mr. Blumberg, whom he knew, was on the car also; knew no one else; Witness stated that the conduct of the boys, so far as he saw, was good; did not notice any rowdyism on the car; boys on rear platform were singing; thinks they were between 16 and 18 years old; does not know how many there were; can not recall hearing any profane language or cursing or swearing; did not see any misconduct; was not looking that way; only heard them singing.

32 Thereupon, in order to further maintain the issue on its behalf joined, defendant offered as a witness FRANK MUSCATTO who testified in substance that he lived at 216 7th St., S. E. Was a passenger on a Glen Echo car when a young man had his leg cut by a piece of glass; was sitting three or four seats in front; heard some singing on the back of the car and some words; did not hear any vulgar language, swearing or profanity; heard the glass when it broke; turned around and saw the gentleman have a piece of glass sticking right in the middle of the leg; glass was sticking in his leg—right leg. Witness does not know what became of the boys; did not know of any passengers complaining about any conduct on the car; none of the passengers seemed to be annoyed.

Thereupon the defendant, in order to maintain the issue on its behalf joined, offered as a witness WARREN E. ANDERSON who testified in substance that he is a Division Superintendent for the defendant company, and was on duty when a passenger was cut on the

33 leg by a piece of broken glass; that he was on duty at 9th and F streets; was standing on the northwest corner. That there was a car coming to a stop at 9th and F Streets, eastbound, and he heard a crash as if some glass was being broken and hurried to the rear end of the car and saw that one of the window glasses had been broken out. "I immediately got up on the rear platform and I saw a young man sitting inside holding his knee. I asked what was wrong with it, and someone said that a piece of glass had cut him, and picked up the piece and showed it to me;" did not know who broke the glass. Q. But who showed you the glass? A. Now, someone. I can't recall whether he showed it to me or some boy standing near him, but I think he had the piece of glass in his hand or pointed at it and showed me the piece that cut him. Witness stated that he saw seven or eight boys on the car platform; some were in the act of getting off and left the car as soon as they could. Plaintiff went to drug store; witness followed him. "There was no one in there that would take a chance to try and stop the blood. I then suggested that he go to the hospital and he didn't like the idea of riding in an ambulance; I suggested I would call an ambulance and have him sent there in an ambulance, but he didn't like the idea of riding in an ambulance, so we walked."

34 "We were at 9th and F and the hospital was on 15th street. We walked up to 10th and down 10th and the wound was bleeding very much and I preferred to take the chance. I went in a drug store at the corner of 10th and E. * * * I asked him if he wouldn't do something to stop the blood, which he did. He tried. He put something on it. Then we took the Avenue car and rode up to 15th street and went down to the hospital and Dr. Lewis dressed the wound by cauterizing it with iodine; and he sewed it up—took one stitch in it." Witness saw the wound; thought it about one-half to five-eighths of an inch. The Doctor dressed it and witness brought him back to the car line. "I just walked along and held to his arm. He was able to walk and limped a little. We took the F St. car, or the 13th and D rather, and I went to his home with

him." Witness stated that plaintiff had told him some boys broke the glass on the rear platform and a piece fell on his leg and cut him. Q. Did he make any complaint of disorder on the car? A. He never spoke of any complaint at all, any rowdyism, or anything of that kind.

Upon cross-examination witness stated that when he first saw plaintiff he was holding his knee; that he afterwards pointed or
35 picked up the glass and showed it to him; glass was either
in plaintiff's hand or some one handed it to him; could not
say positively.

Thereupon the defendant, in order to maintain the issue on its behalf joined, offered as a witness GEORGE E. WYNKOOP who testified in substance that he lives at 246 14th street, Northeast and is employed as motorman for the defendant company, and that he remembers a passenger on one of his cars being cut by a piece of glass in May, 1914. Witness stated they were coming from Glen Echo; had a pretty good load on all the way down; some of them were singing and having a good time; nothing out of the way so far as he could see; when he got to 9th and F streets he heard the glass smash; that he looked around and saw that it was smashed; that he stopped and got off; someone said that someone had been cut with a piece of glass; that the boys on the back broke a glass in the window; Witness did not hear any boisterous conduct; they were singing and seemed to be enjoying themselves; nothing out of the way.

On cross-examination witness testified that there was nothing he could see in the way or out of the way; if he had seen anything in
36 the way he would have stopped the car; that it was his business to look out in front to see if there was anything on the track; that he did not know what cat calls were.

This being all the evidence for either side, the defendant by its Counsel tendered to the Court prayers as follows, and prayed that the same be granted and read to the jury:

I. The jury are directed to return a verdict in favor of the defendant. (Refused. Exc. A. M. G.)

II. The jury are instructed as matter of law that no presumption of negligence arises in this case from the mere happening of the injury to the plaintiff, and before the plaintiff is entitled to a verdict they must find from a preponderance of the whole evidence that the defendant was guilty of some act or acts of negligence as charged in the declaration which the defendant should have foreseen would probably result in injury to the plaintiff, and that the injury to the plaintiff was the result of such negligence. (Granted.)

III. The jury are instructed as matter of law that a street railway company is not in any sense an insurer of the safety of its passengers. (Granted.)

IV. The jury are instructed as matter of law that even if they find from the whole evidence that some of the passengers on the rear platform were noisy and were engaged in singing and joking with each other, it cannot be presumed that by reason of these facts alone

or any of them that they were dangerous persons or that their presence on the car imperiled the safety of other passengers, or that any of them would, by other disorderly acts, injure other passengers. (Refused. Exc. A. M. G.)

V. The jury are instructed as matter of law that even though they find from the whole evidence in this case that the passengers on the rear platform of the car were noisy and boisterous, but before the car reached Ninth and F Streets that they had not been guilty of such acts or conduct as would put a reasonable man on notice that they intended or contemplated the infliction of injury or unless restrained

37 would inflict injury upon other passengers, or that their conduct might reasonably result in such injury to passengers, and as the car approached Ninth and F Streets, one of the number accidentally or even with design, but with no previous warning or notice to the conductor, broke a window glass and inflicted injury upon the plaintiff with such suddenness that the conductor could not by the exercise of reasonable care have interfered and prevented injury, then they are instructed that the plaintiff cannot recover in this case and the verdict should be for the defendant. (Granted.)

V-a. The jury are instructed as matter of law that before they can find a verdict in favor of the plaintiff they must believe from the whole evidence in the case that the agents or servants of the defendant in charge of the operation of the car knew or should have known that danger existed to its passengers or was reasonably to be apprehended, and that thereafter they failed to exercise reasonable care to prevent the infliction of such injury. (Granted.)

VI. The Court instructs the jury that where a street car company in the operation of its cars applies the ordinary usage and methods that obtain and are observed in such business as the same is conducted by men of average prudence, and in the course of the performance of its business unforeseen incidents and accidents occur, negligence or unskilfulness be imputed to it merely as the result of such accident. Knight v. Met. R. R. Co. 21 App. D. C. 494. (Rejected. Exc. A. M. G.)

VII. The Court instructs the jury that while it is the duty of conductors to preserve order on their trains, in view of the delicate and often difficult and dangerous duties devolving upon them, they should be allowed a reasonable discretion in performing them and their employes should not be held responsible in damages where reasonable judgment seems to have been exercised in good faith. Sprinks v. R. R. Co. (Miss.) 63 So. 190. (Refused. Exc. A. M. G.)

VIII. The Court instructs the jury that while the defendant company owed to the plaintiff in this case a duty to exercise care for his safety from insult or injury while a passenger, that this duty did not make it incumbent upon the conductor to actively interfere with other passengers until he had reason to apprehend that the presence or conduct of such other passenger or passengers on the car constituted an actual menace to the plaintiff; and, further, that he owed identically the same duty to every other passenger on the car to protect them from injury or insult, including those passengers who

38 were on the rear platform whose conduct in this case is charged to have been the cause of the plaintiff's injury, and that the conductor had no right to expel such passengers from his car until and unless he had good reason to believe that they contemplated or intended injury or insult to fellow passengers; and even though they were conducting themselves so as to attract the attention of other passengers, if their conduct was not such as to threaten injury or insult or serious inconvenience to fellow passengers, the conductor would not have been justified in expelling them from his car. (Refused. Exc. A. M. G.)

IX. Even though the jury may believe from the evidence that the plaintiff was injured as a result of the negligence charged against the defendant, still the jury has no right to allow the plaintiff speculative, imaginary or conjectural damages, or any damages which are not fairly and satisfactorily established by a preponderance of the whole evidence. The same burden is upon the plaintiff to prove the amount of his damages as it is to prove the other elements of his case, by a preponderance of the whole evidence; so that if the jury have a doubt in their minds as to whether they should allow damages for a particular injury or not on account of the weight of the testimony, then it would be their duty to eliminate such element of damages from the verdict. (Granted.)

X. The jury are instructed that their verdict should be based solely upon the evidence, without regard to the parties. It would be a violation of their oaths as jurors to be influenced by or to consider to any extent the fact that the plaintiff is an individual or that the defendant is a corporation. It is the duty of the jury to permit neither sympathy nor prejudice for or against either of the parties to have any influence upon their verdict, which must be based solely upon the preponderance of the whole evidence and the law as stated by the Court. (Granted.)

39 To the action of the Court in refusing to grant defendant's prayers numbered one (1), four (4), six (6), seven (7), eight (8), the defendant, by its Counsel then and there noted an exception, which exception was duly noted by the Court upon its minutes.

The Court thereupon charged the jury as follows:

Gentlemen of the jury, the plaintiff in this case sues to recover damages from the defendant for injuries caused by the negligence of the defendant. The negligence alleged in the declaration consists in the fact that while he was a passenger on the car, certain other passengers were guilty of disorderly conduct in the course of the trip from Glen Echo to 9th and F Streets, and that while engaged in this disorderly conduct one or more of them broke a glass on the rear of the car, which caused the injury to the plaintiff.

The rule of law is that the railroad company in transportation — its passengers is bound to use the highest degree of care for their safety in the method of transportation which it affords them; and in this specific case if the railroad company permitted passengers to be and remain upon the car whose conduct was such as might reasonably lead to injury to other passengers, and there was injury result-

ing from the conduct of those passengers, then the railroad company is liable for such injury.

To bring it right down to the question in this case, if you find from the testimony that the conduct of these boys on the rear platform, as you heard it detailed by the witnesses on both sides of this case, was such as would reasonably lead to the conclusion that some other passengers might be injured through their misconduct, and that the railroad company did not stop any such misconduct as they were guilty of, and that as a result of that misconduct on the part of these passengers on the back platform, this glass was broken and the plaintiff was injured, then the railroad company is responsible for such damages as the evidence shows the plaintiff suffered.

That is, to my mind, the broad and only question so far as negligence is concerned in the case. Of course if these passengers, the boys, as they are called, on the back platform broke the glass in getting off the car not in a disorderly manner but as an accident not connected with any disorder on their part, the railroad company could not be responsible for the injury to the plaintiff, although the boys might have been disorderly on other parts of the trip. In other words, the breaking of the glass must have been a part of the disorderly conduct, if you find it was disorderly, on the part of these boys.

I give you, in addition the following instruction:

40 The jury are instructed as matter of law that no presumption of negligence arises in this case from the mere happening of the injury to the plaintiff, and before the plaintiff is entitled to a verdict they must find from a preponderance of the whole evidence that the defendant was guilty of some act or acts of negligence as charged in the declaration which the defendant should have foreseen would probably result in injury to the plaintiff, and that the injury to the plaintiff was the result of such negligence.

The jury are instructed as matter of law that a street railway company is not in any sense an insurer of the safety of its passengers.

The jury are instructed as matter of law that even though they find from the whole evidence in this case that the passengers on the rear platform of the car were noisy and boisterous, but before the car reached Ninth and F Streets that they had not been guilty of such act or conduct as would put a reasonable man on notice that they intended or contemplated the infliction of injury or unless restrained would inflict injury upon passengers, or that their conduct might reasonably result in such injury to passengers, and as the car approached Ninth and F Streets, one of the number accidentally or even with design, but with no previous warning or notice to the conductor, broke a window glass and inflicted injury upon the plaintiff with such suddenness that the conductor could not by the exercise of reasonable care have interfered and prevented injury, then they are instructed that the plaintiff cannot recover in this case and the verdict should be for the defendant.

The jury are instructed as matter of law that before they can find a verdict in favor of the plaintiff they must believe from the whole evidence in the case that the agents or servants of the defendant in

charge of the operation of the car knew or should have known that danger existed to its passengers or was reasonably to be apprehended, and that thereafter they failed to exercise reasonable care to prevent the infliction of such injury.

Even though the jury may believe from the evidence that the plaintiff was injured as a result of the negligence charged against the defendant, still the jury has no right to allow the plaintiff speculative, imaginary or conjectural damages, or any damages which are not fairly and satisfactorily established by a preponderance of the whole evidence. The same burden is upon the plaintiff to prove the amount of his damages as it is to prove the other elements of his case, by a preponderance of the whole evidence; so that if the jury have a doubt in their minds as to whether they should allow damages for a particular injury or not on account of the weight of the testimony, then it would be their duty to eliminate such element of damage from the verdict.

The jury are instructed that their verdict should be based solely upon the evidence, without regard to the parties. It would be a violation of their oaths as jurors to be influenced by or to consider to any extent the fact that the plaintiff is an individual or that the defendant is a corporation. It is the duty of the jury to permit neither sympathy nor prejudice for or against either of the parties to have any influence upon their verdict, which must be based solely upon the preponderance of the whole evidence and the law as stated by the Court.

If the verdict is for the plaintiff, it should be in such sum as in your opinion will adequately compensate him for the pain and suffering which he endured as a result of the injury, for the loss of time which is shown by the evidence to have occurred by reason of the injury, and also for such expenses as he has been put to in his attempt to be cured of the injured, all not to exceed the amount named in the declaration.

41 Mr. Baker: If your Honor please, I wish to call attention to the prayer in regard to damages, and the words there used "weight of the testimony." There being no conflict of testimony in regard to damages, it might be that the word "weight" there would have no importance.

Mr. Barbour: Perhaps different deductions may be made from the same evidence.

Mr. Baker: I am just calling the Court's attention to that. I want an exception to that particular part.

The Court: You may have an exception.

Mr. Baker: Your Honor also used the words "be and remain upon the car." I take it the conduct would not have to be such that the company would have to put the person off. It might make the person behave himself.

The Court: You may have an exception to that.

Mr. Barbour: I desire to take an exception to that portion of your Honor's charge in which you speak of the degree of care required on the part of the company.

The Court: I said in the carriage of passengers the highest de-

gree of care was due from the railroad company to the passengers. That was in connection with your prayer to the effect that they are not insurers.

Mr. Barbour: The particular point is that there is no duty to protect passengers from other passengers until notice is brought home that there is danger.

The Court: Yes; that is true, too, but I used that expression in regard to the highest care in connection with your instruction that the railroad companies are not insurers. When it comes to the degree of care which they are to exercise for other passengers, then their care begins when they have reasonable ground to apprehend injury to other passengers.

And thereupon before the retirement of the jury, the defendant, by its counsel, renewed its exception to the refusal of the Court to grant its prayers Nos. 1, 4, 6, 7 and 8, and the refusal of the court to direct a verdict in favor of the defendant.

The jury thereupon retired to consider of their verdict, and returning, announced their verdict in favor of the plaintiff in the sum of Five Hundred Dollars (\$500).

42 And thereupon, on the 13th day of March, 1916, after notice duly given, the defendant, by its Counsel, moved the Court to arrest the judgment upon grounds stated in writing and filed with the record, as follows:

- (1) The plaintiff's declaration fails to state a cause of action.
- (2) The plaintiff's declaration does not show that the breaking of the glass which caused the injury to the plaintiff was the result of or connected with the loud, boisterous and rough conduct of the certain boy passengers mentioned in said declarations, or that the breaking of the glass was pursuant to any purpose or design on the part of any passengers, or that said purpose or design, if it existed, was known or could have been known to the defendant or its employees, or that the defendant or its employees had reason to know that any danger of any kind threatened the plaintiff as a probable result of said loud, boisterous and rough conduct, or that the breaking of the glass resulted proximately from said loud, boisterous and rough conduct.

And thereupon, on the 13th day of March, 1916, after notice duly given, the defendant, by its Counsel, moved the Court to set aside the verdict upon the following grounds:

- (1) The verdict was and is contrary to the evidence.
- (2) The verdict was and is unsupported by the evidence.
- (3) The verdict was and is contrary to the weight of the evidence.
- (4) The verdict was and is contrary to the Court's instructions.
- (5) The Court erred in refusing the defendant's prayer No. 1.
- (6) The Court erred in refusing the defendant's prayer No. 4.
- (7) The Court erred in refusing the defendant's prayer No. 6.
- (8) The Court erred in refusing the defendant's prayer No. 7.
- (9) The Court erred in refusing the defendant's prayer No. 8.

(10) Because the evidence failed to show that there was reasonable ground for the defendant to apprehend personal injury to the plaintiff from the conduct of passengers on the car.

(11) Because the verdict was grossly excessive.

43 Both of said motions were argued and heard together on the 31st day of March, 1916, upon consideration whereof the Court overruled both of said motions, to which action of the Court the defendant again excepted, which exceptions were separately and severally noted *open* the minutes of the Justice presiding at the trial.

44 Be it remembered that each of the separate and several exceptions taken by counsel for defendant to the rulings of the Court in admitting and refusing the instructions were taken by counsel for the defendant, then and there before the jury retired, separately and severally noted upon the minutes of the Justice presiding at the trial, and in order that the foregoing matters and things which would not otherwise appear of record may be made so to appear, and that it may be made known that the foregoing constitutes the substance of the evidence given in the course of the trial of this cause, counsel for defendant prays the Court to sign this bill of exceptions which has been settled by agreement of counsel for both parties.

And the same is accordingly so signed and sealed by the Court and made a part of the record of this cause this 13th day of Oct., 1916.

ASHLEY M. GOULD,
Associate Justice.

We agree to above as bill of exceptions in above cause.

DANIEL W. BAKER,
J. W. STAGGERS,
Attorney- for Plaintiff.
JNO. S. BARBOUR,
Attorney for Defendant.

[Endorsed:] Copy. At Law. No. 57194. Frank W. Perry vs. Wash. Ry. & E. Co. Bill of Exceptions.

Endorsed on cover: District of Columbia Supreme Court. No. 3035. The Washington Railway & Electric Company, a corporation, appellant, vs. Frank W. Perry. Court of Appeals, District of Columbia. Filed Nov. 14, 1916. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAR 31 1917

Henry W. Hodges
Clerk

IN THE

Court of Appeals, District of Columbia

JANUARY TERM, 1917.

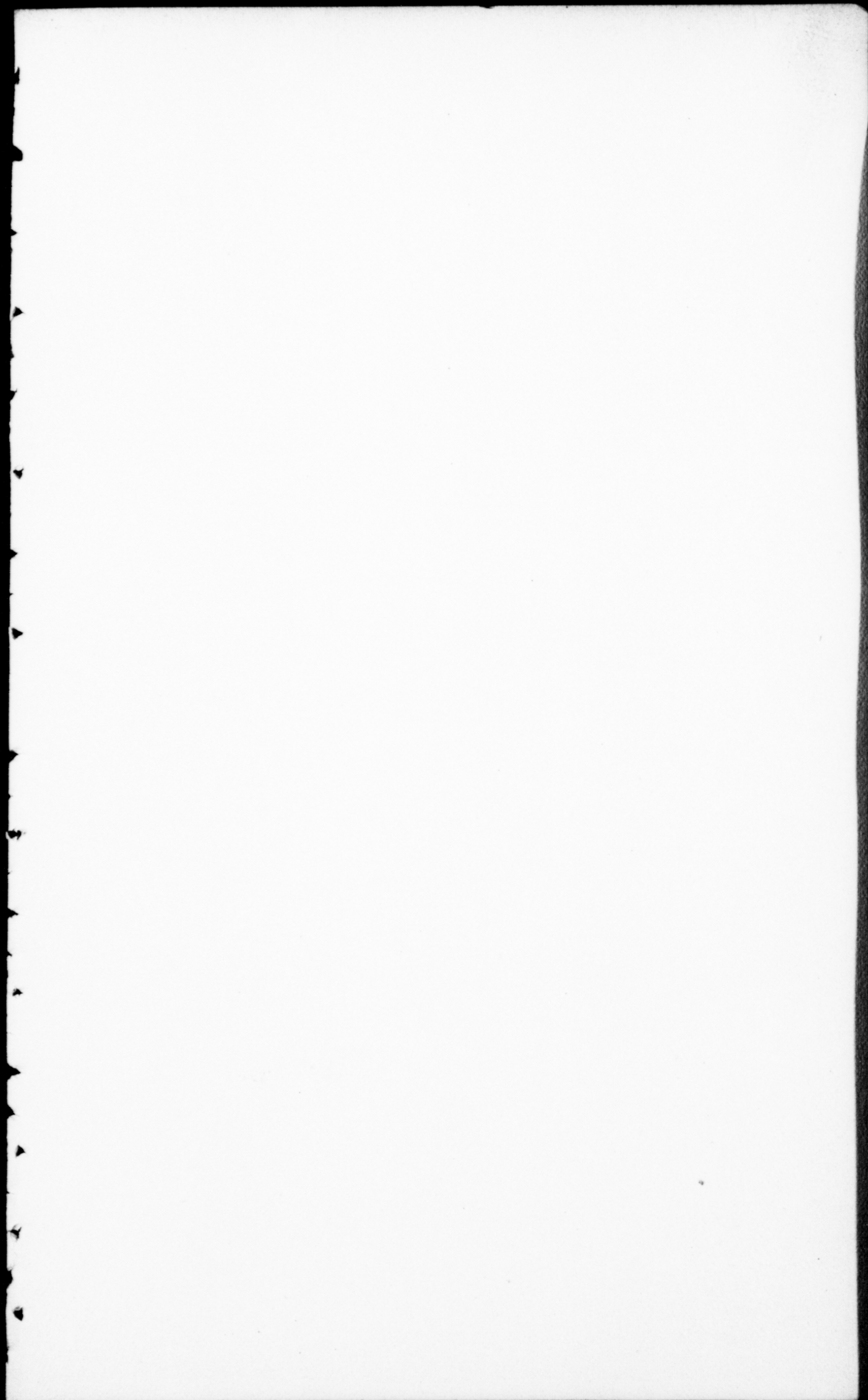
WASHINGTON RAILWAY & ELECTRIC COMPANY, *Appellant,*

vs.

FRANK W. PERRY, *Appellee.*

BRIEF OF APPELLEE.

DANIEL W. BAKER,
JOHN W. STAGGERS,
Attorneys for Appellee.



IN THE
Court of Appeals, District of Columbia

JANUARY TERM, 1917.

WASHINGTON RAILWAY & ELECTRIC COMPANY, *Appellant*,

vs.

FRANK W. PERRY, *Appellee*.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Appellant raises two questions that require a consideration of the case. First, the sufficiency of the declaration, and second, whether the evidence is sufficient to warrant the court in submitting the case to the jury. Any objection to the ruling of the court on the other prayers is immaterial because the court fully charged the jury and the only exception or objection to the charge was the statement of the court as to the degree of negligence required of the defendant to entitle the plaintiff to recover.

Although in the brief for the appellant they have reversed the order in considering these questions, and consider the sufficiency of the evidence before the sufficiency of the declaration, we will take them up in the proper order, and consider,

FIRST, THE SUFFICIENCY OF THE DECLARATION.

The declaration after its formal parts recites that said plaintiff "was sitting in the rear seat of said car, having been received as a passenger thereon, and paid the usual and customary fare, and being a passenger as aforesaid, it then and there became and was the duty of the said defendant corporation to properly maintain and police the said car and to protect the said plaintiff not only from the acts of the agents or employees of the said railway company, but also from unlawful acts and boisterous conduct of other passengers or persons in and upon said car; that there boarded said car aforesaid at Glen Echo aforesaid a number of boys who were on the back of said car and who from said Glen Echo aforesaid until the happening of the event hereinafter mentioned, had been loud, boisterous and rough on said car, that said boys, passengers as aforesaid, continued said conduct from the time they left said Glen Echo until the car arrived at 9th and F Streets, Northwest, that during said time aforesaid, although it was the duty of the said agents of the said defendant to curb the said noise and make the said passengers aforesaid behave, yet the said defendant through its agents, negligently and carelessly permitted the said passengers aforesaid to act in said rough, unruly and boisterous manner, and that as said car arrived at 9th and F Streets, aforesaid, one of the said passengers aforesaid broke a window of said car and the glass therefrom fell on the right leg of said plaintiff and cut the tendon and arteries above the knee."

No demurrer was filed to the declaration, but after verdict a motion in arrest of judgment was filed in which motion the defendant alleged that the declaration did not show that the breaking of the glass which caused the injury to plaintiff was the result of or connected with the loud, boisterous and rough conduct of the several boy passengers, mentioned in said declaration, or that the breaking of

the glass was pursuant to any purpose of or design on the part of the passengers, or that said purpose or design, if it existed, was known or could have been known to the defendant or its employees, or that the defendant or its employees had reason to know that any danger of any kind threatened the plaintiff as a probable result of said loud, boisterous and rough conduct, or that the breaking of the glass resulted proximately from said loud, boisterous and rough conduct.

The declaration as set out alleges that the unlawful acts and boisterous conduct of the passengers continued until the happening of the breaking of the glass and that said boys, passengers as aforesaid, continued said conduct from the time they left said Glen Echo until the said car reached 9th and F Streets, N. W. (the place where the breaking of the glass which caused the injury occurred), and further the declaration says that "the defendant through its agents negligently and carelessly permitted the said passengers aforesaid to act in said rough, unruly and boisterous manner," and "that as the said car arrived at 9th and F Streets, aforesaid, one of the said passengers (referring to one of the passengers who were engaged in the rough conduct) broke a window of the said car."

There could hardly be any more direct allegation than that the boisterous and rough conduct was in existence at the time of the breaking, and that the breaking resulted therefrom. The addition of the words "by reason of said rough conduct, etc.," would have been sufficient, or "while engaged in said rough conduct," all of which were necessarily implied from the allegations of the declaration. The court in charging the jury construed the declaration in this way, because the court told the jury as follows:

"The negligence alleged in the declaration consists in the fact that while he was a passenger on the car,

certain other passengers were guilty of disorderly conduct in the course of the trip from Glen Echo to 9th and F Streets, N. W., and that while engaged in this disorderly conduct one or more of them broke a glass on the rear of the car, which caused the injury to the plaintiff."

And further the court said:

"To bring it right down to the question in this case, if you find from the testimony that the conduct of these boys on the rear platform, as you heard it detailed by the witnesses on both sides of this case, was such as would reasonably lead to the conclusion that some other passengers might be injured through their misconduct, and that the railroad company did not stop any such misconduct as they were guilty of, and that as a result of that misconduct on the part of these passengers on the back platform, this glass was broken and the plaintiff was injured, then the railroad company is responsible for such damages as the evidence shows the plaintiff suffered."

That there could be no recovery unless the breaking of the glass occurred by the boys while engaged in rough conduct, there can be no doubt, and that the court so told the jury there can be no doubt. The court having instructed the jury that the proximate cause of the breaking must have been the rough conduct of the passengers aforesaid as alleged in the declaration, and having instructed the jury that they must find the breaking was caused by the rough conduct of the passengers, any defect in the declaration would be cured by the verdict because it is well settled that where, in order for a party to recover, the essential fact must be proven, that that fact will be taken as proved where its existence might be inferred from the declaration.

Perry states the law as follows:

Page 237:

"Where the matter is so essentially necessary to be proved that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in the declaration, provided it contains terms sufficiently general to comprehend it in a fair and reasonable intendment, will be cured by the verdict."

Again it is well settled at the present time that if there is error, such as is known as amendable error or is such that if taken notice of prior to or during the trial could have been corrected, it can not be taken advantage of by a motion in arrest of judgment or on appeal.

The leading case on that is the case of Baker vs. Warner, 231 U. S. 588. Speaking of the alleged defects in the declaration the Supreme Court of the United States says, at page 593:

"It is, however, unnecessary to discuss the sufficiency of the complaint, which, even if defective, was amendable. The defendant did not demur, but joined issue, the case was tried by a jury, a verdict for the plaintiff was rendered, judgment was entered, and the defendant then moved in arrest. ✓

"Such motions are not favored. In considering them courts liberally construe the pleadings, giving the plaintiff the benefit of every implication that can be drawn therefrom in his favor. Sentences and paragraphs may be transposed. The allegations in one part of the complaint may be aided by those in another, and if taken together, they show the existence of facts constituting a good cause of action, defectively set forth or improperly arranged, the motion in arrest will be denied.

"In the present case the defendant was put on notice of the extrinsic facts surrounding the publication. The statements in the innuendo, even if misplaced, may after verdict be treated as substantive allegations of fact,

given by transposition, their proper position in inducement or colloquium. The verdict cured the defects, if any, in the complaint, and made it improper to arrest the judgment. *Stanley vs. Brit. Mart. & Y.*, 222; *McClaghry vs. Wetmore*, 6 Johns. 82, 5 Am. Dec., 194; *Brittain vs. Allen*, 13 N. C. (2 Dev. L.), 124; *Tuttle vs. Bishop*, 30 Conn., 80; *Nestle vs. Van Slyck*, 2 Hill., 282. In answer to these decisions the defendant cites *Ryan vs. Madden*, 12 Vt., 55, and other cases, to support his contention that the motion in arrest should have been granted. But those decisions announce that in *Bloss vs. Tobey*, 2 Pick., 330, was admitted to be a hard and technical rule—one which, we think, has been modified by modern and more liberal rules of pleading and practice in the Federal Courts and in those of most of the States.”

To the same effect have been other cases. In *Foley vs. Dwyer*, 122 Mich. Rep., 590, the court said:

“We need not consider whether the averments of damage resulting from breach of the contract by the defendant may be treated as surplusage, as we are convinced that this question was not raised on the trial; and, had it been raised, the court might properly have permitted an amendment.”

In *Knox County vs. Brown*, 103 Mo., 223, the court said:

“No exceptions were taken to the sufficiency of the petition except the motion in arrest of judgment.

“The point is urged before this court that the petition is defective in not stating from whom defendant Sharpe bought the property, and that the vendor, as well as he, had no notice of the mistake.

“The petition, if it is defective *at all*, does not wholly fail to state a cause of action, but states a cause of action, defectively, and hence this objection to it, even though good before trial on motion to make it more definite, or, even on demurrer, comes too late after verdict.”

In Hoffheimer vs. Campbell, 59 N. Y., 269, the court said:

"If the objection had been taken at the trial, complaint might have been amended, or the additional facts supplied. It is a general rule in the trial of actions, that the defects which if pointed out, may have been supplied or avoided, will not be assailable on the appeal."

In Gardiner vs. Kellog, 14 Wis., 658, the court said:

"The objection that complaint contains no averment of the trust * * * comes too late. No such ground of objection was taken in the court below. * * * Were the averment necessary, and had objection been taken at trial, there can be no doubt that the court would have ordered *an immediate amendment*."

In U. S. vs. Lee Yen Tai, 113 Fed., 465, the court said:

"The more important of the errors which have been urged allege defects of form in the petition which might have been cured by an amendment if they had been taken in the court below. They do not appear to have been taken there, and can not be raised for the first time upon appeal."

In Baxter vs. Hart, 104 Cal., 344, the court said:

"In the pleading the contract * * * should have been set out."

It was omitted and defendant might have objected at the trial.

This was not done, and evidence having shown plaintiff's right to recover, it is now on appeal too late to raise the objection for the first time.

Had the objection been made *at or before trial*, it could have been obviated by an amendment of the complaint.

In *Herndon vs. Railroad*, 127 N. C., 110, the court said:

"The objection was not made at the trial, when, if made, the complaint could have been amended, if necessary. It can not be made for the first time here."

In *Ward vs. Merriam*, 193 Mass., 135, the court said:

"The defendant having failed to demur and having gone to trial upon issues raised by pleading as they stood, it is not now open to him to raise the point that 1st and 3d counts do not set out a good cause of action."

In *Middlothian Co. vs. Dahlby*, 108 Wis., 195, the court said:

"If the defendant believed in good faith that the complaint was insufficient it was their duty to challenge it by demurrer * * * so that the trial court might have a chance to rule thereon, and the other side a chance for amendment. This was not done, and the defendants are therefore without any foundation to base their contentions upon."

For these reasons, it is submitted that there is no defect in the declaration.

SECOND, THE SUFFICIENCY OF THE EVIDENCE.

The sufficiency of the evidence is raised by the first prayer, that is, whether or not there was sufficient evidence to go to the jury on the question of liability of the defendant for the acts of the passengers whose acts caused a window to be broken and causing injury to the plaintiff.

Counsel for appellant in his brief cites the testimony of a number of witnesses to show that there was no disturbance on the car, but an examination of the record will show that

there was just as much evidence to show that there was a disturbance and improper conduct, and such improper conduct as to put the company on its guard and require them to properly police its cars and prevent the accident which happened from conduct, though maybe not criminal, but which was likely to cause just such a situation as caused the injury to plaintiff.

The plaintiff, on Record page 9, testified as follows:

“That some boys were standing on the rear platform; that they started to sing and whistle and give cat calls, and were pushing and shoving each other around all the way; that Mr. Thomas left him at 11th and F Streets, one of the boys must have pushed one of them through the window, and a pane of glass came down over his shoulder and ‘it cut right through my leg.’ ”

And again:

“Now just tell us what these boys were doing. Singing and whistling and giving cat calls, jumping up and down so as to make the car bounce, and pushing each other, so far as I could see. When you say they were jumping and shaking the car, just tell us about how they were shaking it. They were trying to make the car rock, trying to make it bounce on its springs. They were jumping up and down on the back platform, bouncing up and down, and that would make the car bounce up and down.

“That there were about four or five of the boys—maybe more than that—and the one in the middle stood there and took his foot and pushed one and the other like that (illustrating), pushing them back and forth on the car. That the cat calls were loud enough for anybody on the streets to hear them; that he did not hear any cursing or swearing; that nothing was broken before the pane of glass; that it came over his shoulder—right shoulder; that it injured his clothes; that it was three weeks before it stopped bleeding.”

“Q. There was nothing vicious about their conduct?
A. Just pushing and skylarking—regular skylarking.”

James Benjamin, a witness for plaintiff, testified as follows (Record, page 10):

“My first attention was called to them by their hollering, and then I saw them later, after the car started, pulling and hauling one another, grabbing one another around the neck, and shoving one another back and forth, whistling and hollering, and so forth. That this continued from the time the car started until he got off at 9th and F Streets N. W. That they kept this up all the way in; hollering loud and whistling, and cat calls and such like. That he noticed it before the car started; ‘they were grabbing one another around the neck and shoving one another back and forth, and slapping one another, and such like, all the way in.’ That he did not hear any cursing or swearing; the conductor was collecting fares; that the conductor did not do anything to stop the boys—‘not that I heard.’ ”

Again (Record, page 11):

“that he had never seen boys act like that on the street; that they kept pulling each other around and shoving, all the way in, ‘just a regular rough-house.’ ”

That Alfred Crosby Kinnanon, the conductor, testified (Record, page 13):

“We had a bunch of young fellows or boys on the back end—were having a sort of good time in general, not raising any disturbance, only among themselves, singing and playing, and I think I spoke to them once not to make too much racket to annoy the passengers, and they didn’t and didn’t annoy anybody. Just before we got to 9th and F Streets, I suppose the rush of getting off, pushing and shoving, one of them broke the big glass in the car window, and a piece of

this glass came down and struck one gentleman in the leg. I remember that very distinctly."

Miss Rose Eck, whose testimony is referred to by the appellant, testified, on page 14 of the Record, that she did not look back to see if the boys were jostling among themselves, and did not look back until after the accident happened.

We respectfully submit that the court was correct in permitting the case to go to the jury. That the question of fact as to the misconduct of the boys, the rowdyism of the boys and the jumping up and down on the car, and the pulling and hauling on the part of the boys among each other, the grabbing of each other around the neck was all conduct from which might have resulted and from which did result the breaking of the glass which caused the injury to plaintiff, and that it was the duty of appellant to properly protect plaintiff from said acts of the passengers. This duty has been laid down by a number of authorities, and except by appellant in his brief, has never been questioned.

In the case of *Mullen vs. Wis. Traction Co.*, 46 Minn., 474, the court laid down the rule as follows:

"It is held in general terms that a carrier is bound to exercise the utmost diligence in maintaining order and guarding the passengers against violence from whatever source arising, which might reasonably be anticipated or naturally be expected to occur and in view of all the circumstances, and the number and character of the persons on board. If this duty is neglected without good cause, and the passenger receives injury which might have been reasonably anticipated or naturally expected, from one who is improperly received and permitted to continue as a passenger, the carrier is responsible."

In *Steamboat Co. vs. Brockett*, 121 U. S., 645, the Supreme Court said:

"The principle is peculiarly applicable as between carriers and passengers, for as held by the same court in *Stewart vs. Brooklyn & C. R. R.*, 90 N. Y., 591, a common carrier is bound, as far as practicable, to protect its passengers while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect them against any misconduct of its own servants engaged in executing the contract."

"Common carriers of passengers for hire are bound to exercise the utmost vigilance and care in maintaining order and guard those they transport against violence from whatever source arising, and which might be reasonably anticipated or naturally expected to occur, in view of all the circumstances and of the number and character of the persons on board."

Flint vs. Norwich & N. Y. Transportation Co., 34 Conn., 554.

"But though in legal contemplation, they (meaning carriers) do not warrant the absolute safety of their passengers, they are bound to exercise the utmost diligence and care. The slightest neglect against which human prudence or foresight may guard, and by which hurt or loss is occasioned, will render them liable in damages. *Prima facie*, where a passenger being carried on a train, is injured without fault of his own, there is legal presumption of negligence, casting upon the carriers the onus of disproving it."

Pitts. & Connellsville R. R. vs. Pillow, 76 Pa., 510.

In *Birmingham R. & E. Co. vs. Baird*, 54 L. R. A., 752, the court said:

"He is not regarded as an insurer of his passengers' safety against every possible source of danger, but he is bound to use all such reasonable precautions as human foresight are capable of to make his passengers' journey safe and comfortable. He must not only protect his passengers against the violence and insults of strangers and co-passengers, but, against the violence of his own servants."

In *Gillingham vs. O. R. R. Co.*, 14 L. R. A., 798, the court said:

"Among obligations which such a contract imposes are to protect the passenger against injury from negligence or wilful misconduct of its servants, and of his fellow-passengers and strangers, so far as practical
* * *."

In *Nellis on Street Railways*, Par. 275, the court said:

"The carrier also owes the duty to passengers to conserve, by every reasonable means, their convenience, comfort, and peace throughout the journey and to protect them from insult, indignities and personal violence, whether of fellow passengers, strangers, or employees of the carrier, so far as it can be done in the exercise of reasonable care and prudence."

In *Britton vs. R. R. Co.* 88 N. C. 536, the court said:

"The carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers and will be held responsible for his servants' neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented."

In *New Orleans R. R. Co. vs. Burke*, 53 Miss., 200 (223), the court said:

"The right and consequently the duty, of the officers in charge of a railroad train to preserve order thereon, and, if necessary, to eject therefrom all drunken, riotous, and disorderly persons, as well as all persons violating the reasonable rules and regulations of the company has been declared and vindicated in countless cases."

In *Vinton vs. Middlesex R. R. Co.*, 11 Allen, 304, the court said:

“Certainly the conductor was not bound to wait until some overt act of violence, profaneness or other misconduct had been committed, to the inconvenience or annoyance of other passengers, before exercising his authority to exclude or expel the offender.”

Two persons fighting. Woman was caught in door as result thereof and injured. On question as to whether carrier was negligent in having no conductor on train, court says:

“The absence of diligence is negligence or neglect; and these questions of diligence and negligence are questions for jury upon the facts of the case made.”

In *Tall vs. Balto. Co.*, 90 Md., 248, the court said:

“The duty to protect passengers against an assault by a fellow passenger being a qualified duty, and the responsibility for a failure to perform that duty ensuing only after servant has neglected to act upon the knowledge, or upon facts which ought to have imparted knowledge, that the injury was threatened.”

In *Spohn vs. Mo. Pac. R. Co.*, 87 Mo., 74, the court said:

“It is the duty of the railroad company and of its conductors to use the utmost vigilance and care in maintaining order, and in protecting passengers from violence and insults from others, though such persons be passengers, and a failure so to do will render the company liable for damages to a passenger injured by reason of such neglect.”

In *Lucy vs. Chi., Gt. Western R. R. Co.*, 64 Minn., 7, the court said:

"The law is well settled that it is duty of a common carrier to use the highest degree of care reasonably practicable in exercising police power to protect its passengers from insult and injury by fellow passengers * * * We are of the opinion that, under the evidence, it was a question for the jury whether or not such care was used."

In *Laring vs. Colder*, 8 Barr., 482, the court said:

"But though in legal contemplation, they do not warrant absolute safety for their passengers, they are bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence or foresight may guard, and by which hurt or loss is occasioned will render them liable in damages."

Counsel have carefully examined the authorities cited in appellant's brief and fail to see where they apply to any questions raised in this case.

The case of *Brevard vs. Lincoln Traction Co.*, 105 N. W., 635, cited by appellant, was a case where a stranger told a passenger to jump off the car, when the conductor had warned her not to jump.

The case of *Empire State Cattle Co. vs. A. T. & S. F. R. R.*, 135 Fed., 135, was not a passenger case. The court merely held that the unexpected rise of water and flooding the stock yards, did not give a cause of action as it was not negligence for a railroad company in not knowing that the river was going to rise

In *Sutton vs. N. Y. C. R. R., et al.*, 66 N. Y., 243, the case was not a passenger case, and the question was whether a brakeman was negligent in not looking to see if a person was on the track. The court merely stated the general principle that negligence is ordinarily a question for the jury, but only when facts would authorize a jury to infer it.

Chittick vs. Phila. Rapid Transit Co., 22 L. R. A. (N. S.), 1073, was a case where plaintiff was looking out of a window nearby a railroad company and there was an electrical explosion and plaintiff claimed damages by reason of fright and nervous shock, and the court held that there was no right of recovery.

In Grand Rapids & Ind. R. R. vs. Boyd, 65 Ind., 526, the court held:

“A common carrier of passengers is not an insurer of the passenger's safety against all accidents and vicissitudes of travel (this is what is quoted by appellants, but opinion goes further saying), but is an insurer against all risks caused or increased by the negligence of carriers where passengers are not at fault.”

It is respectfully submitted that the judgment should be affirmed.

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Attorneys for Appellee.

OCT 11 1917

Henry W. Hodges
Clk

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1917.

No. 3035.

WASHINGTON RAILWAY AND ELECTRIC COM-
PANY, APPELLANT,

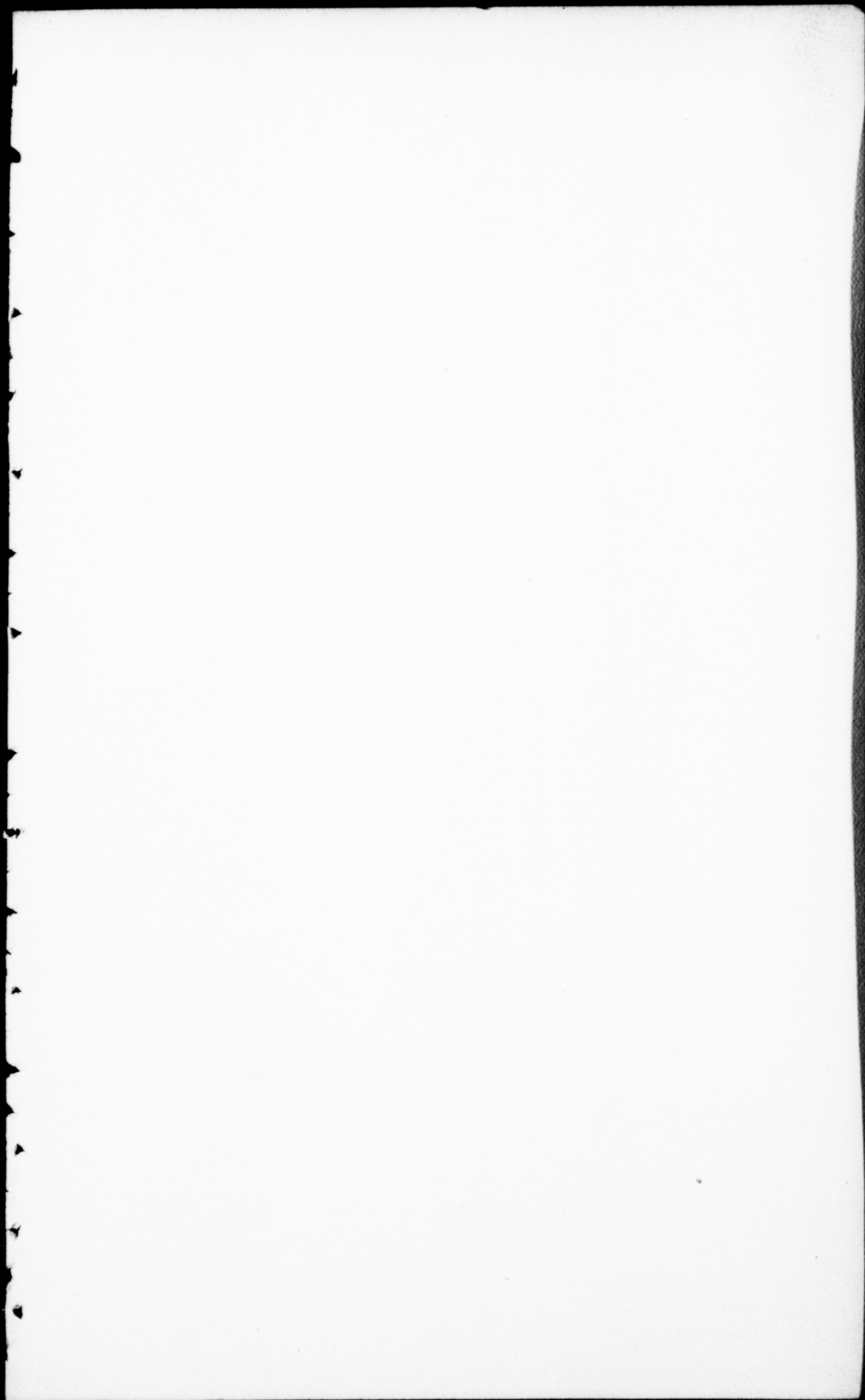
vs.

FRANK W. PERRY, APPELLEE.

ADDENDUM TO AUTHORITIES CITED ON
APPELLANT'S BRIEF.

JNO. S. BARBOUR,

Attorney for Appellant.



In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

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WASHINGTON RAILWAY AND ELECTRIC COMPANY, APPELLANT,

vs.

FRANK W. PERRY, APPELLEE.

ADDENDUM TO AUTHORITIES CITED ON APPELLANT'S BRIEF.

1. THE INSUFFICIENCY OF THE EVIDENCE.

(a) *The doctrine of res ipsa loquitur has no application to the case* (Appellant's Brief, p. 9).

Anderson vs. Mo. Pac. Ry. Co., 88 Wash.,
139, 152 Pac., 1001, 1003.

State vs. Standard Oil Co. (Md.), 96 A., 558.

(b) *The specific evidence was insufficient to show either*

(1) *That a condition of imminent peril existed, or*

(2) *That notice of such condition if it did exist was brought home to the employees.*

Add to cases cited on brief, pp. 14, 16, Nashville, etc., Ry. Co. vs. Lowery's Admr. (Ky)., 147 S. W., 19, 21, 22, 23; Anderson vs. No. Pac. Ry., 88 Wash., 139, 152 Pac., 1001, 1003.

"Injury arising from the sporadic act of an individual or the aggregate impulses of a throng, if

outside the limits of conduct reasonably to be apprehended by one under a strong legal duty to be most keenly sensitive to guard against preventable wrongs, affords no ground of liability. The carrier is not bound to take all possible precautions nor every conceivable safeguard for the safety of passengers, nor to exercise the utmost diligence which human ingenuity can imagine to avert injury. . . . These principles are well settled and have been steadily adhered to. It is not necessary to cite the many cases by which they are illustrated but only to apply them to the facts before us."

Glennon *vs.* Boston Elec. Ry. Co. (Mass.),
93 N. E., 700.

"While it is the duty of a conductor to preserve order on his train, considering the often dangerous duties devolving upon him he should be allowed a wide discretion in performing them, and his superiors should never be mulcted in heavy damages where there has been a bona fide, though mistaken, attempt to afford protection."

Sprinks *vs.* Railroad Co. (Miss.), 63 So., 190.

(c) In cases of this character the culpable wrong of the company and the employee does not consist in the tort of the passenger that inflicts the injury, but consists in the failure of the employee to take steps to prevent that tort after he has received reasonable notice of its imminence.

Towl *vs.* Steam Packet Co., 90 Md., 253, 44 A., 1008.

3. THE INSUFFICIENCY OF THE DECLARATION (Appellant's brief, pp. 22, etc.).

The case of *Baker vs. Warner*, 231 U. S., 588, cited on p. 5 of appellee's brief as the leading case on this subject, and which it was stated at the bar practically overruled *Pollard vs. Lyon*, 91 U. S., 225, does not overrule that

case, or any of the principles contended for by the appellant, but is in entire consonance with them. It simply held that after verdict the declaration should be liberally construed, and then, "if taken together, they show the existence of facts constituting a good cause of action, defectively set forth or improperly arranged, the motion in arrest will be denied," and then continued:

"The statements in the innuendo, even if misplaced, may, after verdict, be treated as substantive allegations of fact, given by transposition their proper position in inducement and colloquium."

This is far from overruling *Pollard vs. Lyon, supra*, or even remotely holding that essential facts not stated in the declaration can be inserted therein merely upon the assumption that they were essential to sustain the verdict.

"If a fact essential to the plaintiff's right of action is neither expressly stated or *necessarily* implied from facts which are stated, a verdict will not cure the defect and judgment will be arrested."

Welch *vs.* Bryan, 28 Mo., 30.

"It is not enough to allege a duty exists and that the defendant has violated such duty. The facts must be stated showing a legal duty. 2 Thomp. Neg., 1249. Unless the duty results in all cases from the facts a declaration so framed is bad in substance."

Brown *vs.* Mallet, C. B., 599.

"It is a general rule in pleading that where any fact is necessary to be proved on the trial in order to sustain the plaintiff's right to recover, the declaration must contain an averment substantially of such fact in order to let in proof."

Bank of U. S. *vs.* Smith, 11 Wheat., 171.

**Defects of Substance in the Declaration Can Not Be
Made Good by the Evidence After Verdict.**

"The presumption that there was sufficient evidence to support findings is generally indulged only as to such findings as are within the issues raised by the pleadings."

4 C. J., 778, Sec. 2727.

"When there was no allegation of an essential fact it can not be presumed that such fact was established by proof."

Idem, Note 74-a, citing *Tumlinson vs. York*, 20 Texas, 694.

"However, an appellate court can not resort to the evidence to establish errors in the conclusions of law, and in reviewing the sustaining of defendant's motion in arrest only the petition can be considered, the evidence must be disregarded."

4 C. J., 673, Sec. 2571, citing *McWilliams vs. Workers Printing Co.*, 188 Mo., 504, 174 S. W., 464.

"In actions to recover damages occasioned by the negligence of the defendant, it is a well settled principle of pleading that a declaration must allege and show sufficient facts on which a duty is founded which it is incumbent on the defendant to perform in respect to the rights and safety of the plaintiff. This is a fundamental principle of pleading, and the right of action in such cases is the breach of the duty thus shown."

Hines vs. Georgetown Gas. Co., 3 App. D. C., 369, 375, citing *Gautret vs. Egerton*, L. R., 2 C. P., 371.

Collins vs. Selden, L. R., 3 C. P., 495.

Respectfully submitted.

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